

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

EMPIRE HEALTH FOUNDATION,) Case No. 2:17-CV-209-SMJ
)
Plaintiff,) December 7, 2017
)
v.) Richland, Washington
)
CHS/COMMUNITY HEALTH SYSTEMS,) Motion Hearing
)
et al.,)
) Pages 1 to 22
Defendants.

BEFORE THE HONORABLE SALVADOR MENDOZA, JR.
UNITED STATES DISTRICT COURT JUDGE

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1 (December 7, 2017; 11:36 a.m.)

2 THE COURTROOM DEPUTY: Please rise.

3 (Call to Order of the Court.)

4 THE COURT: Please be seated.

11:36:18 5 THE COURTROOM DEPUTY: Matter before the Court is *Empire*
6 *Health Foundation v. CHS/Community Health Systems, Incorporated,*
7 Cause No. 17-CV-209-SMJ. Time set for motion hearing.

8 Counsel, starting with plaintiff, please state your
9 presence for the record, and please use the microphones.

11:36:37 10 Thank you.

11 MS. HAMBURGER: Good morning, Your Honor. My name is
12 Eleanor Hamburger, Sirianni, Youtz, Spoonemore, Hamburger,
13 representing Empire Health Foundation. And to my right is Rick
14 Spoonemore, also with my law firm; and Sarah Lyman, representing
11:36:55 15 Empire Health Foundation.

16 THE COURT: Good morning to all three of you.

17 MR. SPOONEMORE: Good morning.

18 MR. KEEHNEL: Good morning, Your Honor. Stellman
19 Keehnel from the Seattle office of DLA Piper. With me today is
11:37:07 20 my partner, Anthony Todaro, representing defendants.

21 THE COURT: Good morning to you, too.

22 I guess I was expecting to hear that based upon your
23 drive here together that you were able to work out all your
24 differences and have come here to just tell me that all matters
11:37:24 25 have been resolved.

1 Is that not the case?

2 MR. KEEHNEL: Well, I paid for the cab. I

3 expect that we'd be --

4 THE COURT: Now, why would you say that?

11:37:34 5 Very well. Counsel, before the Court are motions.

6 Who would like to go first?

7 MR. KEEHNEL: It's our motion, Your Honor.

8 THE COURT: Yes.

9 MR. KEEHNEL: I'll be happy to go first.

11:37:44 10 THE COURT: Very well.

11 MR. KEEHNEL: We only have two subjects today, having
12 narrowed through our reconsideration motion just to the two
13 issues, and that is whether the certificate of need, the CON,
14 constitutes a, quote, change in legal requirements, close quote,
15 within the meaning of the last sentence of 10.14. And then I
16 also want to address the statute of limitation issue.

17 THE COURT: Okay.

18 MR. KEEHNEL: So, Your Honor, it's our position, it's
19 defendant's position that for, really, four separate reasons the
11:38:18 20 CON is not a change as contemplated by that last sentence of
21 3.14. That is, the sequence of events; the text itself; that if
22 you read the APA as a whole, the asset purchase agreement as a
23 whole, you come to the same conclusion; and, finally,
24 plaintiff's acknowledgment that the parties had contemplated
11:38:38 25 pre-contracting that the CON may impose a charity care

1 obligation vis-a-vis the state.

2 THE COURT: Okay.

3 MR. KEEHNEL: So let me touch those -- on those in the
4 same order I introduced them.

11:38:54 5 The sequence. So we know the -- the sequence is that in
6 October 2007, the APA is signed. We have a typo on the first
7 page --

8 THE COURT: Right.

9 MR. KEEHNEL: -- of our closing brief. It says
11:39:07 10 September. It's, of course, October.

11 THE COURT: Okay.

12 MR. KEEHNEL: August 2008, a year later, the CON is
13 issued.

14 THE COURT: Right.

11:39:13 15 MR. KEEHNEL: Two months later there's actually a
16 transaction that's --

17 THE COURT: Right.

18 MR. KEEHNEL: -- consummated.

19 What that means is that my clients had no involvement
11:39:22 20 with the hospital whatsoever, no -- two hospitals, no -- no
21 obligations whatsoever until they actually took over the
22 hospitals. There's nothing they could do. They were powerless
23 vis-a-vis the hospitals.

24 So it's illogical to say that the CON issuing two months
11:39:38 25 before my clients had any role in the hospitals could be a

1 change in the legal requirements. My clients had no charitable
2 care obligations whatsoever until they actually took possession
3 of the hospitals. That's the essence of the motion. And so we
4 think the sequence by itself is dispositive. Your legal
11:39:58 5 requirements don't change if you have no legal obligations
6 whatsoever. We had no legal obligations whatsoever unless the
7 transaction actually closed.

8 THE COURT: So, in general, I guess, for contracts such
9 as these that are sort of more complex, involved, that take a
11:40:17 10 significant period of time to implement -- rather, to close,
11 parties then are expected, is what you're saying, to monitor
12 changes in the law, changes in situation; they're required to do
13 those sorts of things.

14 Is that -- is that essentially what you're saying?

11:40:37 15 MR. KEEHNEL: That's maybe one way of saying it.
16 Here's -- a better way of saying it -- and I'll come back to --
17 my second argument was going to be the text itself. Let me come
18 to that third, because let me jump into the APA structure
19 itself. I think that will help the Court.

11:40:50 20 So -- I have to jump into the text just for a second.

21 THE COURT: That's fine.

22 MR. KEEHNEL: The first -- the first five words of the
23 text of 3.14 are "as of the closing date." The obligations
24 in 3. -- in 10. -- excuse me, 10.14, the obligations in 10.14
11:41:12 25 are, quote, as of the closing date. In other words, that

1 provision doesn't kick in until the closing date. There's
2 just -- plaintiff would have you erase those words and say
3 because the parties signed effective October 2007, a year prior,
4 that we can erase those words, "as of the closing date." Those
5 words have to mean something.

6 The Court, under Washington rules of statute -- of -- of
7 contract interpretation, can't just erase those five words.
8 They have to mean something.

9 THE COURT: I guess I don't -- I don't see the -- I
10 don't see the plaintiffs arguing that those are -- are being
11 erased. They're arguing something else. And I'm -- I believe I
12 know what they're going to argue, and they're going to tell me
13 in a second, but aren't they arguing something else?

14 MR. KEEHNEL: But they have to ignore those words to get
15 to where they want to go. If those words mean anything, they
16 mean there is no obligation under 3 -- under 10.14 until the
17 closing date, and that means the -- the adoption or the issuance
18 of the CON did not happen after there was a legal obligation.

19 If your legal obligation only kicks in as of the closing
20 date, then the CON happened before you had a legal obligation.
21 If your legal obligation kicked in before, because, for example,
22 that language wasn't there, it didn't say "as of the closing
23 date," we'd have a different story maybe.

24 Now let me jump into the APA generally. So the APA kind
25 of has two -- has a structure of two parts. Most of the APA is

1 written in a way that it only kicks in as of the closing date.
2 There are a handful of provisions that are called out explicitly
3 that impose legal obligations on the parties between the time of
4 signing and the closing, and they're called out very explicitly.
11:43:03 5 For example, Section 5 is called, quote, covenants of seller
6 prior to closing, close quote. Section 6, quote, covenants of
7 buyer prior to closing.

8 Those are the covenants that my client had to take care
9 of prior to closing. Those were our legal obligations prior to
11:43:26 10 closing. In Section 6, which identifies what our obligations
11 were prior to closing, what legal obligations we had, what
12 duties we had, there's not a word about charity care. When you
13 get to charity care, that kicks in as of the closing date.
14 That's when our legal obligation began.

11:43:43 15 Indeed, the whole contract is really kind of structured
16 in a way that if you look at Section 1, which Section 1 runs
17 nine pages, it's the guts of the contract, it covers what is
18 being purchased and for how much, it starts out, "as of the
19 closing."

11:44:01 20 The principal obligations of the parties only kick in as
21 of the closing. There are relatively few obligations -- some by
22 the seller, some by my clients, the buyers -- which kick in
23 before. And when they kick in before, the drafters of that
24 contract were absolutely explicit to say that these obligations
11:44:22 25 will apply to you even though you haven't had a closing; these

1 are the ones that you have to do; these are true legal
2 obligations, despite the fact that the transaction has not been
3 consummated. You get the pattern.

4 So when we get to 10.14, which way did the contract
11:44:38 5 drafters go? Did they say that's going to be your legal
6 obligation from day one, from October 2007? Or did they instead
7 say that will be your legal obligation commencing at closing?
8 They chose the latter. They said you don't have a legal
9 obligation until October 2008 when we close the transaction.

11:44:59 10 And, therefore, the CON is not a change. The CON is a
11 preoccurrence event. It does not happen after my client assumed
12 an obligation.

13 THE COURT: Counsel, why would you think that your
14 client would be obligated to do those things until they actually
11:45:16 15 have the -- until the contract is consummated? I mean, I
16 guess -- closed, I should say. I mean, I -- I'm not sure I'm
17 following your argument.

18 MR. KEEHNEL: You're right. That's the whole point of
19 the sequence. My client couldn't have obligations under 10.14
11:45:35 20 unless and until the contract closed. And the parties made that
21 crystal-clear by saying your obligations in 10.14 only apply as
22 of the closing.

23 THE COURT: Okay.

24 MR. KEEHNEL: That is the sequence.

11:45:47 25 And my fourth point on -- on this principal argument is

1 that with the concession that's been made by plaintiff in the
2 briefing, namely that the parties, quote, understood before
3 contracting, before doing anything, that the CON may well
4 include a charity care element, with the parties having had that
11:46:15 5 in their minds and having not put it into the contract, that
6 shows how clear it is that they were not contemplating, by
7 10.14's last sentence, to sweep up the CON into an obligation
8 under 10.14. Because when the parties had contemplated other
9 changes, for example, in the collective bargaining agreement,
11:46:39 10 you'll recall in Section 1.5, they talk about the possibility
11 that there are going to be some changes, and what they say is
12 we're going to add that to the contract; that's going to be part
13 of the contract. We know that might happen, it's in our minds;
14 it's in the contract.

11:46:54 15 Here, what plaintiff is telling us is it was all the
16 same with respect to the CON. The parties knew that they might
17 well have this charity requirement in the CON, that the CON was
18 going to issue before the -- the effective -- before 10.14
19 kicked in, but there the parties didn't say in 10.14: And you
11:47:18 20 have to satisfy any requirements regarding charity obligation
21 imposed vis-a-vis the state; we're going to make that a part of
22 the private contract also.

23 It makes no sense that the parties would know of certain
24 contracts coming down the pike, or certain requirements coming
11:47:33 25 down the pike, include them in places in the contract, saying

1 we're going to include these as part of our contractual
2 relationship, and know the CON and not do the same and somehow
3 have intended to include that under 10.14. Your Honor, that
4 just doesn't make sense. That just doesn't make contractual
5 sense.

6 And we had -- we had super sophisticated lawyers on this
7 project. We had one of the nation's leading persons out of
8 Drinker Biddle in Chicago representing the seller. The parties
9 acknowledged they were both sophisticated parties, well-versed
10 clients, you know, sophisticated clients; very expert lawyers.
11 And the notion that the parties meant, having contemplated that
12 the CON would have a charity care requirement, that the parties
13 only meant to sweep that up via the -- the language in the last
14 sentence of 10.14 and not call it out explicitly, that defies
15 logic. No lawyer would do that. No sophisticated party would
16 do that. People don't do that. They write contracts in an
17 explicit way.

18 They knew how to do that. They did it with respect to
19 collective bargaining. There is no reason to believe that the
20 parties here intended to sweep up the CON's buyer-to-state
21 requirement and put it in as a matter of private contract under
22 the last sentence of 10.14. That just doesn't make sense. Not
23 from timing, not from the text, not from the structure of the
24 APA, and certainly not given that the parties had explicit
25 foreknowledge before contracting that the CON may well have that

1 requirement.

2 THE COURT: Thank you, Counsel. I think you're out of
3 time. If there's one --

4 MR. KEEHNEL: Could I just say a couple words on SOL?

11:49:20 5 THE COURT: Actually, no. Let's skip that argument.

6 MR. KEEHNEL: I have some important things if we have
7 some time at the end.

8 THE COURT: Thank you.

9 MS. HAMBURGER: Good morning, Your Honor.

11:49:34 10 THE COURT: Good morning.

11 MS. HAMBURGER: May it please the Court. I'm Ellie
12 Hamburger.

13 I've provided you with an outline of our presentation,
14 which I've also provided to defense counsel in advance.

11:49:46 15 First off, you know, on a motion for reconsideration,
16 it's -- they're generally disfavored, and they're only granted
17 in highly unusual circumstances, such as a change of law or new
18 evidence that couldn't have been presented before. And none of
19 those unusual circumstances exist here.

11:50:06 20 Moving on to the issue about whether 10.14 includes the
21 CON, the conditions in the CON as changes in legal requirements,
22 the Court's ruling on that was absolutely correct. And the
23 defense counsel ignores the key date here is that date that the
24 contract became effective. That's October 10th, 2007. It's on
11:50:36 25 Page 1 of the contract.

1 And what became effective on that date are the
2 requirements imposed on CHS in 10.14 that, when it took control
3 of the hospitals, it was obligated to use best efforts to
4 provide historic levels of charity care.

11:50:58 5 Now, that -- that obligation was in place and effective
6 on October 10th, 2007. The performance of that obligation did
7 not take place until the hospitals were under CHS's control, but
8 the legal obligation is effective on the plain language of the
9 contract starting in October 2007.

11:51:24 10 Now, that language included the last sentence: Subject
11 in all respects to changes in legal requirements, governmental
12 guidelines, or policies. And that last sentence is important.
13 It was included to make sure that if there was a governmental
14 guideline, policy, or law that had a different requirement, the
11:51:49 15 contract would be synchronized with that charity care
16 requirement.

17 So fast-forward to August. The Department of Health
18 here in Washington offered a conditional CON to CHS that said
19 we'll let you have it, but you have to agree to this increased
11:52:09 20 amount of charity care.

21 CHS writes back, yes, we agree.

22 And then on August 29th, the CON was issued, and that
23 increased CHS's legal requirement to provide charity care after
24 it took care of the hospitals.

11:52:25 25 THE COURT: But you're in the middle of negotiations

1 with sophisticated parties on both sides.

2 MS. HAMBURGER: Yes.

3 THE COURT: Why isn't that a persuasive argument that
4 you should have written that into your -- your agreement?

11:52:39 5 MS. HAMBURGER: It is written in, in the exact, precise
6 language, the last sentence of 10.14. It says: Subject in all
7 respects to changes in legal requirements.

8 Any sophisticated lawyer, any lawyer would read that and
9 understand that that not only includes changes on the federal
11:53:04 10 level, but it also includes requirements imposed by the state
11 regulator for charity care that would be imposed on CHS when
12 it's running the hospitals.

13 And of course the sophisticated attorneys negotiating
14 this want to make sure that CHS is not whipsawed between two
11:53:25 15 different standards. The idea here is to synchronize the two
16 standards, make them the same, and that's why the "subject to"
17 language is in there. Otherwise, if the "subject to in all
18 respects" -- and "all" is very important there, in every
19 respect, whether it's anticipated or unanticipated changes in
11:53:45 20 legal requirements --

21 THE COURT: Well, what about the argument that 10.14 has
22 also language of "as of the closing date"?

23 MS. HAMBURGER: Right, but that's because both the CON
24 and -- the original contract and the CON both recognize that
11:54:01 25 performance of charity care can only happen after CHS takes

1 control. But the legal commitment, the legal requirement was
2 imposed first by contract as "best efforts at historic levels"
3 starting in 2007 when CHS agrees. Then it's modified, it's
4 changed when the Department of Health comes in and says, no,
11:54:27 5 that's not good enough. It has to be at regional levels. The
6 legal requirements, not the performance, but the actual legal
7 requirements was first imposed in October 2007, and then it's
8 modified by the CON in August 2008. And that is -- it is a
9 change. It is a change from the initial standard in the
11:54:53 10 contract to a new standard. And it's designed to synchronize
11 the required care for the hospitals so there's one standard by
12 which they have to apply.

13 You know, the argument that the sophisticated lawyers
14 weren't monitoring this issue is -- is baseless. A
11:55:16 15 sophisticated lawyer would look at that last sentence and say,
16 "Yes, we're taken care of." When the Department of Health comes
17 in and says, as they've done in other CONs, "You have to provide
18 charity care at the regional level," we know it's going to sweep
19 it up. Sophisticated lawyers know that this clause at the end
11:55:35 20 of 10.14 ensures that a single charity care obligation is
21 imposed and is enforceable.

22 Briefly on the statute of limitations, Your Honor, the
23 defendants argue that the standard just focuses on efforts. But
24 that's not true. The very -- the primary threshold issue in
11:56:02 25 whether CHS has met its charity care obligation is whether it

1 has provided charity care at or exceeding the regional level.
2 That can be only measured on an annual basis, after the
3 information is reported to the Department of Health and made
4 public. There's no other way Empire could monitor and evaluate
5 whether performance on an annual basis is met.

6 THE COURT: Okay. Counsel, I don't need to hear --

7 MS. HAMBURGER: Okay.

8 THE COURT: -- on the statute.

9 MS. HAMBURGER: Unless Your Honor has other questions on
10 10.14, then I'll --

11 THE COURT: Thank you.

12 MS. HAMBURGER: Thank you.

13 THE COURT: You said you had a couple other things.

14 MR. KEEHNEL: Well, I would talk about the statute of
15 limitations a little bit, but I know that's not really why
16 you -- you really wanted to hear us on the first argument.

17 THE COURT: I did.

18 MR. KEEHNEL: And I'm just going to say one more word on
19 that, and then maybe two words on the statute of limitations.

20 I'm 63 now. I've practiced commercial law my whole
21 life. I'm not here as a witness. But, Your Honor, you've been
22 in the commercial law environment, too. You and I came from
23 slightly different paths --

24 THE COURT: Counsel, I have a feeling you have a
25 tremendously larger amount of experience in this area than I do.

1 MR. KEEHNEL: But you see a lot of cases. I mean, my
2 cases go on for years at a time, and sometimes they're big. But
3 I rub shoulders a lot with the commercial lawyers, the people
4 who draft these agreements. I'm not here to testify. But I
11:57:34 5 think you and I both know that Keith Anderson, if he really
6 meant to -- to impose on my clients, as he's representing the
7 predecessor to plaintiff here, if he really, sitting in his
8 office in Chicago, Drinker Biddle, one of the world's renowned,
9 you know, healthcare transaction lawyers, if he wanted -- he
11:57:56 10 knew about the CON -- we know that -- he knew it was probably
11 going to have this charity care requirement.

12 Do you think he wouldn't be involved in dereliction of
13 his duties if he hadn't said "and we're going to have that be a
14 part of the agreement," as opposed to relying upon this muck at
11:58:14 15 the end of 10.14?

16 You and I both know that they were not contemplating
17 that the CON was going to become part of this contract. It's
18 just a reality.

19 THE COURT: Well, that's true. I also understand people
11:58:24 20 sometimes are not as clear as they can be in contracts than
21 perhaps they should be.

22 MR. KEEHNEL: Well, this contract is -- is pretty clear.
23 There's a lot of -- there's a lot of ink thrown on those pages.

24 Two words on --

11:58:35 25 THE COURT: Well, I think this litigation is clear

1 evidence of the contrary. I think -- I think there are
2 reasonable interpretations on both sides. I don't want to
3 discount the arguments that you or your clients have made on
4 this point. I think they're good arguments.

11:58:57 5 So I guess I'll just say that.

6 MR. KEEHNEL: So on statute of limitation, this notion
7 that by the CON a one-year-by-one-year requirement was imposed
8 for satisfying the reasonable effort standard, it just doesn't
9 make sense.

11:59:17 10 If you look at the face of the CON itself, which is what
11 plaintiffs are asking you to look at to come up with this
12 supposed imposition of a one-year-by-one-year performance
13 standard, it's not there. It's just not there.

14 There is a reference to averages, right? Reasonable
11:59:35 15 efforts to try to -- to reach a reasonable -- or a regional
16 average. But nowhere does it say "and we're going to measure
17 that each year at a particular time."

18 Indeed, as you know from our papers, the fiscal years of
19 hospitals around the state that report to the state, there are
11:59:53 20 six different fiscal year-ends that are used. The state does
21 not actually produce an amalgamated annual report number. The
22 state kind of throws a dart at the dartboard. There is no such
23 magical, this is the annual number.

24 And the state, as you saw in our papers, acknowledges
12:00:12 25 you can't rely on these numbers for being, really, what the

1 hospitals have done because a lot of what the hospitals' efforts
2 are in free care and low-cost care don't get captured by the
3 numbers.

4 The state wouldn't come to you today and say, "The --
12:00:30 5 the regional numbers that we report are reliable to show on an
6 annual basis for all hospitals in the region what their actual
7 charity care levels were." The state wouldn't do that. The
8 state wouldn't do that because the state in its reports that
9 you've seen, because we put them in front of you and quoted to
12:00:50 10 you, have said, to the contrary, "Don't rely on them." I mean,
11 explicitly. That they're -- that they're misleading.

12 (Reading): Comparisons based solely on data included in
13 this report can result in misleading findings. That's in the
14 state's 2015 report to Todaro dec Exhibit G at 238.

12:01:11 15 The notion that you're going to splice from the fact the
16 state does put out annually some numbers, which it doesn't say
17 actually establish what the true numbers are, that that somehow
18 silently creates an annual,
19 we're-only-going-to-measure-you-every-12-months obligation on
12:01:32 20 behalf of my client -- it's not written in there.

21 This is an obligation that attached to my client on day
22 one, to make reasonable efforts from that point forward. We
23 think they did. Plaintiff thinks they didn't. In fact,
24 plaintiff has gone out on a limb and said, "Buyers, you never
12:01:50 25 did."

1 And the combination of the accusation that we never
2 did -- that's a pled accusation -- and the fact that the
3 contract is not set up in that annual, sequential way,
4 establishes the statute ran long ago, long before this lawsuit
5 was filed.

12:02:10

6 At one point plaintiff also made reference to the fact
7 that there is an informational reporting requirement in 10.14.
8 You know who that report goes to? The board of trustees.
9 There's nothing in the contract that says that report is going
10 to go to the seller or the seller's successor. It goes to a
11 board of trustees.

12:02:23

12 Who picks the board of trustee members? My clients.
13 There's no obligation for anybody from Empire or from the
14 Foundation to be on that board. There can be three community
15 members. They don't have to be from the Foundation. They don't
16 have to be from anyplace other than people we want. That's the
17 only person who gets those reports. They're informational
18 reports.

12:02:38

19 And how do we know that that also doesn't set up a
20 sequential obligation, even though the report has to be given
21 annually? Because the contract itself in 10.14 says for ten
22 years why don't you give us these reports. 10.14 establishes a
23 perpetual obligation of my client to make best efforts -- or
24 make, whatever it is, reasonable efforts. Sorry.

12:02:51

25 If -- if that internal report, informational reporting

12:03:12

1 was what supposedly was going to be creating this annual
2 obligation, why does it end after ten years? What happens in
3 the 11th year? We don't have any obligation?

4 Of course we do. 10.14 says we have a perpetual
12:03:30 5 obligation. It just shows that that annual internal report is
6 merely informational.

7 There is nothing in the contract, written by very
8 sophisticated parties, assisted by very sophisticated lawyers,
9 that says, "Your performance is going to be measured for
12:03:43 10 purposes of ascertaining a breach of 10.14 on the basis of an
11 annual determination."

12 THE COURT: Thank you.

13 MR. KEEHNEL: It's not there.

14 THE COURT: Counsel, since I didn't allow you to address
12:03:55 15 the issues of statute of limitations and they were raised, would
16 you like to address those?

17 MS. HAMBURGER: Your Honor, only if you have questions.

18 THE COURT: What about this argument -- yes, I do.

19 What about this argument of this perpetual requirement
12:04:25 20 that he is raising?

21 MS. HAMBURGER: So, Your Honor, the -- first of all, we
22 know the requirement has ended because they have sold the
23 hospital, right? So the -- the -- the question about it being
24 into perpetuity is academic at this point.

12:04:44 25 We agree on the statute of limitations, and it ends when

1 the transaction closed in the sale to MultiCare.

2 Let me just say this, though: The period is very
3 clearly a year. It's clear that the information becomes
4 available annually and is reported, whether for informational
12:05:05 5 purposes or accountability purposes, to the trustees on an
6 annual basis. It's clear in the CON itself. In the CON that
7 the department issued they reference the annual regional average
8 that the hospitals were at in the Eastern Region at that time.

9 And so the measure based upon the CON itself is very
12:05:28 10 clear that it is an annualized periodic measurement because they
11 call out exactly what the measurement was at that time.

12 THE COURT: Okay. Thank you.

13 MS. HAMBURGER: Thank you.

14 MR. KEEHNEL: Could I just make one correction to that?
12:05:41 15 I think she misspoke unintentionally.

16 THE COURT: Oh, okay.

17 MR. KEEHNEL: I think she said -- I think she said the
18 CON refers to something annual. It doesn't. If you'll look at
19 Exhibit A, Page 2 of 6 and 3 of 6, it merely says the hospital,
12:05:57 20 quote, will use reasonable efforts to provide charity care in an
21 amount comparable to or exceeding the average amount of charity
22 care provided by hospitals in the Eastern Washington Region.
23 Currently the amount is 3.35 percent of adjusted revenue.

24 It doesn't say annual revenue. It just says that's what
12:06:16 25 we're deeming the current level to be. Doesn't say whether it's

1 the last six months, doesn't say whether it's a melded year,
2 doesn't say it's a two-year average. There's nothing on the
3 face of the CON, which is what we have to look at, to try to
4 come up with some annual, we're going to measure you on an
12:06:33 5 annual basis. Doesn't say that.

6 THE COURT: Okay.

7 MS. HAMBURGER: Your Honor, I just would direct your
8 attention to the actual August 29th CON Condition No. 3, and it
9 has the number of the regional average at the time in that
12:06:43 10 provision.

11 THE COURT: All right.

12 Well, thank you. I appreciate the arguments. I
13 appreciate the briefing in this case. And I would encourage you
14 to, in fact, book a cab on the way back to the airport; perhaps
12:07:01 15 further discussions can continue.

16 Thank you again for your presentations.

17 THE COURTROOM DEPUTY: Please rise.

18 Court is adjourned.

19 (Hearing concluded at 12:07 p.m.)
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C E R T I F I C A T E

I, KIMBERLY J. ALLEN, do hereby certify:

That I am an Official Court Reporter for the United States District Court for the Eastern District of Washington in Richland, Washington;

That the foregoing proceedings were taken on the date and at the time and place as shown on the first page hereto; and

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this 8th day of January, 2018.

/s/ Kimberly J. Allen

Kimberly J. Allen, CRR, RMR, RPR, CCR
Washington CCR No. 2758
Official Court Reporter
Richland, Washington